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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 909

VERNON L. PEPERSACK,
WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

LEONARD HALL, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Vernon L. Pepersack, Warden of the Maryland Penitentiary prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on January 17, 1963.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated January 17, 1963, is not yet reported at the time of this Petition, and a copy of said opinion is attached hereto as Appendix A. The District Court opinion, *Hall v. Warden*, 201 F. Supp. 639, is reproduced herein as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254[1].

QUESTIONS PRESENTED

I. Whether the decision of this Honorable Court in the case of *Mapp v. Ohio*, 367 U.S. 643 (decided June 19, 1961) has application to cases which were tried, and affirmed on appeal, in state courts, prior to June 19, 1961?

II. Whether the search of the hotel room premises of the Respondent, by police officers of Baltimore County was illegal?

III. Whether state court Rules of Procedure, which stipulate that objections to allegedly illegally obtained evidence are waived unless objection was made at the trial, are applicable in the instant case?

STATEMENT OF THE CASE

Leonard Hall, Jr. was tried by a jury in the Circuit Court for Baltimore County, Maryland, for the crime of murder, and was found guilty of murder in the first degree and sentenced to death.

The testimony revealed that on July 16, 1959, Anna Gaff, age 66, was found stabbed to death in a tavern which she and her husband owned and operated. Cigar boxes containing cash, checks and certain keys were discovered to be missing from the premises.

On the day of the crime, while police officers were on the premises conducting an investigation, one of the officers was approached by a man who identified himself as Leonard Hall, Jr. Hall asked certain questions of the police officer,

and advised him that he had been on the premises on tl night previous. The officer took Hall's name and address, which was given to him as the Ritz Hotel in Baltimore City. Later that same day, the officer advised his superior of this conversation, and the superior suggested that it might be a good idea to question Hall. Police officers found Hall in a neighboring tavern. Hall greeted them with the words, "I knew youse were coming." Hall then said to the proprietress of the tavern, "Mary, they think I did it." These words were uttered by Hall before any statement was made to him by the police officers, or before any indication was given by them that he was suspected in the murder — and, in fact, it does not appear that he was actually suspected of this crime until he uttered those words.

Hall was taken by the officers (at approximately 6:25 P.M. on July 16, 1959) to the Essex Police Station for questioning. During the course of the ensuing interrogation, which began at 8:07 P.M., Hall stated that he had recently come from New Jersey and was staying at the Ritz Hotel in Baltimore City. After it was ascertained that there was no such hotel in Baltimore City, Hall voluntarily agreed to accompany the officers in their search for the hotel where he was in fact staying, and for that purpose left the Essex Station with Detectives Shinnamon and Davis at 12:28 A.M., July 17, 1959.

Following Hall's directions, Detectives Shinnamon and Davis drove to the Edison Hotel, which is located near the intersection of Fayette and Gay Streets in Baltimore City. Enroute Hall pointed out to the officers a restaurant and stated that he h. eaten in it on the day of the crime. Hall then advised the officers: "I am not going to show you any more. I've told you enough. I think I ought to see a lawyer." The officers advised him, "That is your privilege.", and they continued on into Baltimore City. Before they

reached the hotel, Hall said, "I would like to see a minister." The officers replied, "Sure." A few minutes later Hall said to the officers, "You fellows have been nice to me. I will show you where the apartment, where the hotel room is." He then advised them, "Make a right turn.", and the officers parked across the street from the hotel. Hall gave the officers the room number and as the members of the Evidence Squad, who had been following in another car, went up to his room, Hall started crying and said, "I am not afraid to die. I am afraid of going to Hell. They are going to find the clothes when they get up to the room." Officer Shinnamon asked, "Are you willing to tell me about it?". He replied, "Yes, if you will take me to a station, I will tell you what happened." The record is not completely clear as to whether or not this was before or after the Evidence Squad had come out of the hotel and had advised the officers accompanying Hall that they had found some evidence in the room.

The police officers who searched Hall's room found therein three cigar boxes containing checks and money which were identified as having been taken from the Gaff tavern. These cigar boxes were shown by the police officers to Hall on the night of his confession, but *not until after he had completed the second of his confessions*, to Mr. C. Leonard Perkins, a court reporter.

These cigar boxes, and their contents, were introduced by the State of Maryland at Hall's trial, without any objection from Hall's counsel — who were retained by him, and not court appointed.

At the trial Hall took the stand solely for the purpose of testifying as to the voluntary nature of his confessions. He did not deny during this testimony the truth of the matters contained in those confessions, but dwelt only on

certain threats or inducements purportedly made to him by the police officers.

Hall appealed his conviction to the Court of Appeals of Maryland, and again he did not raise, before that court, any objection to the introduction into the evidence of the fruits of the search of his hotel room. The Maryland Court of Appeals affirmed Hall's conviction, *Hall v. State*, 223 Md. 158, 162 A. 2d 751.

Hall thereafter sought collateral relief under the Uniform Post Conviction Procedure Act, at which time counsel was appointed by the court to represent him. A hearing was held by the Honorable John E. Raine, Jr. on October 30, 1960, in the Circuit Court of Baltimore County, and relief was denied by Judge Raine. This denial was upheld by the Court of Appeals of Maryland, *Hall v. Warden*, 224 Md. 662, 168 A. 2d 373. In the post conviction proceeding Hall raised for the first time the allegation that evidence obtained by an illegal search was used both to obtain damaging admissions from him, and as evidence against him at his trial. The Maryland court found that any challenge to the legality of the search, and the use of the fruits thereof, was waived by failure to raise the question either at the trial or on appeal. The court commented that this contention could not properly be raised under the Maryland Post Conviction Procedure Act, because of that waiver. It is noteworthy, we think, that this decision of the Maryland Court of Appeals in denying leave to appeal from the post conviction hearing was filed on March 10, 1961, some three months before this Honorable Court's decision in *Mapp v. Ohio*, *supra*.

Hall then applied to this Court for Certiorari from this denial, and his Petition for Certiorari was denied on October 9, 1961 in *Hall, Jr. v. Warden, Maryland Penitentiary*,

No. 107 Misc., October Term, 1961 — almost four months after the decision in *Mapp*.

On November 29, 1961, Hall filed his Petition for Writ of Habeas Corpus in the United States District Court for the District of Maryland, and that court issued the Writ so that the prisoner might have an opportunity to present his evidence on all issues. These issues, *inter alia*, included the allegation that Hall was deprived of due process of law in that evidence obtained by virtue of an unlawful search and seizure was introduced at his trial, and that the same evidence had been used to induce him to make damaging statements to the police.

At the hearing, Hall declined to present any testimony, and elected to submit the case to the District Court on the transcript of the trial in the state court (as prepared for the appeal to the Court of Appeals of Maryland from the original conviction and sentence). The State of Maryland also submitted the case on the record, and counsel for Hall and for the State of Maryland were given the greatest latitude in arguing the point of law presented, which argument consumed almost three hours.

The District Court, after carefully reviewing the transcripts and the decisions of the Maryland state court, determined that Hall's constitutional rights had not been violated and denied relief. *Hall v. Warden*, 201 F. Supp. 639 (Jan. 23, 1962). Judge Thomsen, however, granted a certificate of probable cause on January 31, 1962 and the United States Court of Appeals for the Fourth Circuit, sitting in banc, heard argument on June 7, 1962.

On January 17, 1963, that court in a three to two decision (Judges Haynsworth and Bryan, dissenting) reversed the decision of the District Court and remanded the

case to the United States District Court for the District of Maryland so that that court could afford the State of Maryland a reasonable opportunity to retry the prisoner. In default of such a retrial, the District Court was directed to order Hall's release. In its opinion, the Court of Appeals concluded that Hall's constitutional rights had been violated in that (a) the search of his premises had been illegal (b) introduction of such evidence in a state court proceeding was in violation of Hall's constitutional rights under the Fourth Amendment, as the decision of the Supreme Court in *Mapp v. Ohio* was retroactive and (c) that Hall had not waived his constitutional rights, by failing to object to that evidence at his trial.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the instant case is directly in conflict with the decision of the Tenth Circuit Court of Appeals in the case of *Gaitan v. United States*, 295 F. 2d 277 (Apx. B, infra, page 30). The facts of the *Gaitan* case, briefly stated, are that in 1957 Joseph and Delores Gaitan, husband and wife, were sentenced to imprisonment in Federal Court for violation of the narcotics laws. Prior to their trial, on a motion to suppress evidence, the District Court found that a search and seizure had been made and effected by State and local officers without a search warrant or other legal authority, but without participation on the part of federal officers. The motion to suppress was denied and the narcotics obtained by the search were introduced in the evidence. The judgments were affirmed, 252 F. 2d 256; and Certiorari was denied 356 U.S. 937, 78 S. Ct. 779, 2 L. Ed. 2d 812. In October, 1960, petitioners filed a motion under 28 U.S.C. Section 2255 to vacate and set aside the judgments and sentences on the ground that the admission of such evidence constituted a

violation of their constitutional rights. That motion was denied, 189 F. Supp. 574, and the case was appealed to the United States Court of Appeals for the Tenth Circuit. That court affirmed the action of the District Court in denying the motion. Circuit Judge Bratton, speaking for a unanimous court, discussed the effect of *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669, and *Mapp v. Ohio, supra*. The opinion said, in pertinent part:

> "* * * The evidence was admitted and the judgments and sentences became final. Upon becoming final, they fell within the range of the doctrine of res judicata as between the petitioners and the United States in respect to the evidence being admissible or inadmissible, depending upon the circumstances under which it was obtained. *And a change thereafter in the rule relating to the admissibility of evidence obtained in that manner did not arrest or suspend application of the principle of res judicata to such judgments and sentences.* Warring v. Colpoys, 74 App. D.C. 303, 122 F. 2d 642, 136 A.L.R. 1025, certiorari denied, 314 U.S. 678, 62 S. Ct. 184, 86 L. Ed. 543." (Emphasis supplied.)

The *Gaitan* case was cited by the District Judge in the instant case and relied upon by him in reaching his determination that *Mapp v. Ohio, supra* was not intended to require that a new trial or release must be granted to a person convicted in a state court where the judgment had become final before the decision of this Honorable Court in the *Mapp* case.

The *Gaitan* case was also cited by the Petitioner herein in his brief to the Court of Appeals, and was discussed by Petitioner's counsel in oral argument below. In its thirty-one page opinion below, however, the Circuit Court did not mention or discuss *Gaitan*, nor make any attempt to differentiate between the holding of the Tenth Circuit regarding the retroactive nature of *Mapp* and its own holding.

Your Petitioner submits that this direct conflict between the decision of the Fourth Circuit Court of Appeals in the instant case, and that of the Tenth Circuit Court of Appeals in the *Gaitan* case, is in itself sufficient and compelling reason for this Court to grant Certiorari.

2. The decision of the Court of Appeals is also believed to be erroneous in that the majority of that court concluded that the search of the hotel room premises of the Respondent Hall, by police officers of Baltimore County, was illegal.*

In *Zap v. United States*, 328 U.S. 624, 90 L. Ed. 1477, 66 S. Ct. 1277, Mr. Justice Douglas, in delivering the opinion of the Court, pointed out that the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. Citing *Davis v. United States*, 328 U.S. 582, 90 L. Ed. 1453, 66 S. Ct. 1256, Justice Douglas said, at page 628:

"But those rights may be waived."

And, in *United States v. Rabinowitz*, 339 U.S. 56, 94 L. Ed. 653, 70 S. Ct. 430, Mr. Justice Minton, speaking for the majority of a divided Court commented, at page 63:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches

* The Court of Appeals (Apx. 13), indicates that under *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182, the confession of Hall must fail, if it is shown at a re-trial that his confession was a direct or indirect result of evidence obtained by an illegal search. Your Petitioner is not aware of any decision of the Supreme Court of the United States which makes the doctrine of *Wong Sun v. United States*, 9 L. Ed. 2d 441, applicable to criminal prosecutions in state courts.

must find resolution in the facts and circumstances of each case. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357, 75 L. Ed. 374, 382, 51 S. Ct. 153. Reasonableness is in the first instance for the District Court to determine."

In the instant case, there was no testimony offered to the District Court concerning the circumstances of the search. Hall did not testify at the District Court hearing, but submitted on the record of the proceedings at the original state court trial. The District Judge carefully considered all of the testimony in the record concerning the search, which testimony is undisputed. The District Judge concluded that Hall had voluntarily approached the officers at the scene of the crime during the afternoon following its commission, and voluntarily gave his address, although erroneously. After his arrest, Hall volunteered to show the police where the hotel was located, and was taken into Baltimore City for that purpose. When they came to the hotel, the District Judge noted, Hall gave the officers the number of his room, and after the Evidence Squad had gone in he said that they would find the clothes (worn by him in the robbery-murder) in the room. The District Judge having considered all of the evidence stated:

"Upon consideration of all the evidence in the record, I conclude (1) that Hall has not shown that the search was illegal, and (2) that no strong reasons or special circumstances exist in this case to prevent the application of the general rules stated in Whitley v. Steiner, 293 F. 2d 895 that Hall has forfeited his right to challenge the search."

79 C.J.S. Searches and Seizures, Section 62, page 818 says that the consent on which the waiver of the constitutional immunity against unreasonable searches and seizures is predicated may be given by actions alone, or action supplementing statements indicating consent. Petitioner be-

lieves it obvious from the undisputed portions of the testimony, on which the District Court relied, that Hall in originally approaching the police officers, in advising the police officers that he was staying in a hotel in Baltimore, in agreeing to show the police officers the location of that hotel, and in supplying them with the number of his hotel room when they arrived at the hotel, clearly waived any objections to the search, and in fact, consented thereto.

We believe that the finding of the Court of Appeals, under all of these circumstances, is clearly erroneous, both as to law and as to fact and that such a finding therefor constitutes proper grounds on which this Court should grant Certiorari.

3. Petitioner also believes that the decision of the Court of Appeals is erroneous in that the court considered, but did not apply, the principle enunciated in Footnote 9 to the majority opinion in *Mapp* (367 U.S. 659). Mr. Justice Clark in delivering the opinion of the Court specifically states, in Footnote 9, that:

> "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

The procedural requirements concerning objections to evidence are clearly set out in the Maryland Rules of Procedure, 1961 Edition. Rule 522d2 states:

> "Every objection to the admissibility of evidence shall be made at the time when such evidence is offered, or as soon thereafter as the objection to its admissibility shall have become apparent, otherwise the objection shall be treated as waived."

And Rule 385 of the Maryland Rules of Procedure provides, in pertinent part:

> "This court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; * * *"

In a long line of cases, the Court of Appeals of Maryland has consistently held, under the above cited rules, that objections not made at the trial cannot be pursued on appeal. In *Banks v. State*, 228 Md. 130, 179 A. 2d 126 (1962) the Maryland Court said, at page 132:

> "Appellant says that under the recent case of Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, the narcotics and narcotics paraphernalia found in the house were illegally seized and inadmissible as evidence. It would appear that the entry of the police and their search were permissive or at the least, unobjected to, but — assuming the contrary — the record makes it crystal clear that no point was made at the trial that Banks' arrest or the searches and seizures were illegal, and no objection was taken to the introduction into evidence of the articles seized on the ground of illegal arrest or unwarranted or unconstitutional seizure. * * * 'The cases are legion holding that during a trial counsel may waive review by failure to object to evidence.'"

Nor can they, once waived, be pursued in a Post Conviction Proceeding. *Hall v. Warden*, 224 Md. 662, 168 A. 2d 373.

The Maryland rules concerning objections to the evidence and concerning review on appeal were obviously established long before the decision of this Honorable Court in *Mapp*. We find, however, nothing in *Mapp*, after careful review, which infringes on the operation of those rules and, as noted above, we believe Footnote 9 to the *Mapp* opinion fully contemplates the application by the states of rules similar to the Maryland rules.

In *Whitley v. Steiner*, 293 F. 2d 895, the Court of Appeals for the Fourth Circuit, after a re-examination of all relevant Supreme Court cases, discussed the doctrine of waiver, or forfeiture, of constitutional claims. The court said "* * * where a state prisoner, asserting a denial of constitutional rights in connection with his conviction, has a remedy in the state court but fails to avail himself of it, and later finds himself without a state remedy, he may not have redress through federal habeas corpus. * * * Under such circumstances the petitioner has, to utilize what is probably most appropriate legal doctrine, 'forfeited' his constitutional claim." In that same case, the Fourth Circuit recognized a number of exceptions to the stated general rule, and it is one of those exceptions that the Court of Appeals has applied to the Respondent Hall: "where the petitioner can present other strong reasons justifying his failure; or finally, where there exist particular circumstances which are deemed to justify federal action."

Petitioner believes that the general rule in *Whitley v. Steiner, supra* is properly stated, but we believe that the Court of Appeals erred in holding that Hall came within the exception to that rule, as we do not believe that there exist strong reasons justifying Hall's failure to object at his trial. Whatever the reasons that may be advanced for the failure of Hall to object, the short answer is that Mrs. Mapp did object, and persisted in that objection, to the end that her conviction was vitiated, -- and Hall could have similarly objected and pursued his objections.

It is Petitioner's view that the purpose and intent of Footnote 9 in the *Mapp* decision was that state court prisoners would be required to follow the procedures established for registering objections, and that in the absence of compliance with the state court rules, waiver applies. Petitioner believes that the Court of Appeals, be

failing to follow the guidelines of Footnote 9 has come to a conclusion contrary to that intended by this Honorable Court, which, we believe constitutes additional good reasons for the granting of Certiorari.

4. The decision of the Court of Appeals in the instant case is at variance with the overwhelming majority of the decisions of the highest courts of several states. In the interest of brevity we will not, herein, review in detail the holdings of every state which has held *Mapp v. Ohio, supra* not to be retroactive. For the convenience of the Court, however, we set out below the citations to the leading cases wherein a conclusion that *Mapp* is not retroactive has been reached.

New Jersey — *State v. Watson*, 180 A. 2d 206;
New York — *People v. Friola*, 227 N.Y.S. 2d 423;
People v. Loria, 223 N.Y.S. 2d 462;
Alaska — *Goss v. State*, 369 P. 2d 884;
California — *In re Harris*, 366 P. 2d 305 (concurring opinion);
Nebraska — *Erving v. State*, 116 N.W. 2d 7;
Ohio — *Spence v. Sacks*, 183 N.E. 2d 363.

We have found only one state court decision, that of the Supreme Court of Michigan in *People v. Winterheld*, 115 N.W. 2d 80, holding *Mapp* to be retroactive. A close scrutiny of the entire proceedings in *Winterheld*, however, discloses that that decision was brought about because of a peculiar set of circumstances involving both the *Elkins, supra* and *Mapp* decisions. Since the date of *Winterheld*, we find no other case in Michigan in which *Mapp v. Ohio* has been applied retroactively.

We also believe noteworthy the action of the State of California when it adopted the exclusionary rule in 1955, in *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. Shortly

after *Cahan* was decided, the California Supreme Court in *People v. Kitchens*, 46 Cal. 2d 260, 294 P. 2d 17 held that the exclusionary rule would be given only a limited retroactive effect, and applied it retroactively to those cases which were pending on appeal at the time of the decision in *Cahan* — just as most of the states cited above have applied *Mapp*.

We also call to the attention of this Court the decision of the United States District Court for the Southern District of New York in the case of *People v. Fay*, 207 F. Supp. 595. In that case the District Court considered a habeas corpus application from a state prisoner. The prisoner's original conviction had been finally affirmed by the Court of Appeals of New York on June 5, 1961 — fourteen days prior to *Mapp*. The petitioner had then sought reargument of his application to appeal to the Court of Appeals, basing his argument on *Mapp*. The state court denied the application, stating as its reason that the *Mapp* case did not apply to the petitioner, because his case had been completed before the date of the *Mapp* decision. The United States District Court, Cashin, Judge, on August 7, 1962, concurred in the finding of the state court, and denied the writ.

CONCLUSION

The conflict between the decisions of the Fourth and Tenth Circuit Courts of Appeals regarding the retroactive or prospective nature of *Mapp v. Ohio* constitutes a compelling reason why this Honorable Court should grant the writ prayed. As we have noted above, the welter of confusion that exists concerning the recognition to be given to state procedural requirements, under Footnote 9 of the *Mapp* opinion, can only be clarified by this Honorable Court. The overwhelming majority of the highest courts

of the several states have decided the points involved at variance with the decision of the Court of Appeals in the instant case, leaving a cloud of uncertainty in the minds of all as to the full ramifications of *Mapp v. Ohio*, that only this Court can dispel.

For these various reasons this Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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